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12 UNITED STATES DISTRICT COURT

13 FOR THE CENTRAL DISTRICT OF CALIFORNIA

14 UNITED STATES OF AMERICA,) CR No. 11-436(A)-MRW
15)
Plaintiff,) GOVERNMENT'S MEMORANDUM OF
16) POINTS AND AUTHORITIES RE
v.) IMPEACHMENT OF TESTIFYING
17) DEFENDANT
JOEL CIRILO SOSA HERNANDEZ,)
18) Trial Date: December 6, 2011
Defendant.)
19) Courtroom of the
20) Honorable Michael R. Wilner
21)
22)

23 Plaintiff United States of America, by and through its
24 counsel of record, the United States Attorney for the Central
25 District of California, hereby files its memorandum of points and
26 authorities regarding the proper use of cross-examination of
27 defendant regarding his previous statements made in support of a
28 motion to suppress evidence.

1 The government's memorandum is based upon the attached
2 discussion, authorities, and any other evidence or argument that
3 the Court may wish to consider.

4 DATED: December 5, 2011

Respectfully submitted,

5 ANDRÉ BIROTTE JR.
United States Attorney

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7 ROBERT E. DUGDALE
Assistant United States Attorney
Chief, Criminal Division

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10 /s/
MICHAEL DORE
Assistant United States Attorney

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12 Attorneys for Plaintiff
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On October 11, 2011, defendant Joel Cirilo Sosa Hernandez
3 ("defendant") filed a signed declaration in support of his motion
4 to suppress in which defendant declared under penalty of perjury
5 that he had the title of "Assistant Manager" at the 907 Club and
6 "exercised managerial control over the day-to-day operations of
7 the Club." (CR 46 at 3.) On November 29, 2011, defendant's
8 counsel filed an opposition to a government motion in limine that
9 claimed defendant "was simply a bouncer," and "effectively a
10 security guard who works indoors rather than outdoors." (Opp'n
11 to Mot., CR 62 at 1, 3.) If defendant testifies along the lines
12 of the latter argument at trial, the government is entitled to
13 impeach him with his inconsistent former statements.

14 Simmons v. United States, 390 U.S. 377 (1968), precludes the
15 use of suppression hearing testimony to establish guilt. Id. at
16 394. The Ninth Circuit has made clear, however, that "Simmons
17 does not preclude all use of a defendant's suppression hearing
18 testimony, just use of such testimony on the issue of guilt."
19 United States v. Manning, 56 F.3d 1188, 1199 (9th Cir. 1995);
20 see also Harris v. New York, 401 U.S. 222, 222-26 (1971) ("[T]he
21 shield provided [by the Fifth Amendment privilege against self
22 incrimination] cannot be perverted into a license to use perjury
23 by way of a defense, free from the risk of confrontation with
24 prior inconsistent utterances.").

25 Thus, while the Fifth Amendment protects defendant "from the
26 use of his suppression hearing testimony in the Government's case
27 in chief to prove his guilt," it "[does] not protect him from
28 impeachment for testifying falsely." United States v. Beltran-

1 Gutierrez, 19 F.3d 1287, 1291 (9th Cir. 1994); see also Manning,
2 56 F.3d at 1199 (noting that the defendant's "trial testimony
3 could have been impeached by any prior inconsistent statements
4 made at the suppression hearing"); see generally Fed. R. Evid.
5 613(b) (impeachment with prior inconsistent statements).

6 If defendant testifies along the lines of his opposition to
7 the government's motion in limine that he had no control over the
8 day-to-day operations of the club (including, for example, hiring
9 employees), then the government should be permitted to impeach
10 defendant with his prior sworn statements to the contrary.

11 DATED: December 5, 2011

Respectfully submitted,

12 ANDRÉ BIROTTE JR.
13 United States Attorney

14 ROBERT E. DUGDALE
15 Assistant United States Attorney
Chief, Criminal Division

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17 /s/
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